



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 30, 2022

Damien Brower
City of Brentwood
150 City Park Way
Brentwood, CA 94513

Re: Your Request for Advice
Our File No. A-21-159(a)

Dear Mr. Brower:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹

Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTION

Under the Act, may members of the Brentwood City Council take part in decisions related to the reconstruction of a “water feature” in a residential community the officials are members of, given that reconstruction would result in each community member paying up to \$770?

CONCLUSION

No, because the decision would potentially result in an assessment on each official’s property and the amount is not nominal. The Act generally prohibits the officials from taking part in decisions related to the reconstruction of the water feature. However, in some cases, the participation of an otherwise disqualified official may be legally required and certain decisions may be segmented so that the officials are able to take part in decisions in which they do not have a disqualifying financial interest.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18109 through 18998 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS AS PRESENTED BY REQUESTER

City of Brentwood Mayor Joel Bryant and City Councilmembers Susannah Meyer and Karen Rarey own their respective residences located in the Shadow Lakes Neighborhood (the “Community”) within the City. The Community is governed by a homeowners’ association incorporated as the Shadow Lakes Community Association (the “Association”). The Association consists of 780 separate property interests.² According to the Association’s 2021 Budget Report, every Association member pays a monthly assessment of \$50, the Association’s annual income is \$468,017.40, and all that income went to paying the Association’s annual expenses. None of the three Councilmembers serve on the Association’s Board of Directors.

The City approved the Community in 1993. At that time, the Community was called “Brentwood Lakes.” Thereafter, the Community was rebranded as “Boulder Ridge.” Part of this rebranding included City consideration of certain modifications to the Community’s entryway hardscaping and landscaping. On March 21, 2000, the City’s Planning Commission adopted Planning Commission Resolution No. 00-22 which approved these modifications. Among other things, Resolution No. 00-22 required the Community to install proposed enhancements to existing entry features (the “Improvements”), including curved walls with pilasters and modified landscaping and hardscaping located on City-owned property at a vehicle entrance to the Community at the corner of Balfour Road and East County Club Drive. The City’s records are incomplete regarding the Improvements but confirm that the Improvements included installation of a water feature.

On July 12, 2000, the City, the developer of the Community, and the Association’s predecessor in interest (the “Former Association”) executed a license agreement allowing the Former Association to access the City-owned property at an entry to the Community for the construction and maintenance of the Improvements. Under the license agreement, the City’s sole remedy is to remove the Improvements if the developer, the Former Association, or their successors fail to maintain the Improvements. Pursuant to the license agreement, \$25,000 was paid to the City as a one-time fee.³ The license agreement expressly provides that in exchange for that fee neither the developer nor the Former Association may be held liable for any costs incurred by the City to remove the Improvements.

On February 2, 2021, the Association filed an application with the City for a proposed project to replace the water feature with a planter. The Association estimates that the proposed project would cost a total of \$37,000, which equates to \$47 per Association member.

In its application for the proposed project, the Association notes that the water feature is not in working order. The Association estimates that repair of the water feature would cost \$75,000 to \$100,000. Based upon these estimates, the maximum approximate repair cost would be \$129 per Association member. However, in addition to any decision to repair the fountain, you have stated

² Statement by Common Interest Development Association filed with the Secretary of State on April 1, 2021 for Shadow Lakes Community Association (State Entity No. C2345380).

³ This \$25,000 fee was “equivalent to City amenities that would have been required by [the Community’s developer] at the time of the initial tentative subdivision map approval.”

that the City may also consider a full reconstruction of the water feature. The estimated cost to reconstruct the water feature is between \$500,000 and \$600,000, or up to \$770 per Association member.

The Association is authorized to impose a special assessment of up to five percent of gross expenses from the previous fiscal year.⁴ A special assessment exceeding this amount must be approved by a majority of a “quorum” of the Association’s members. Applying that provision to the Association’s 2021 Budget Report, you state that the maximum special assessment that the Association’s Board of Directors could authorize in the 2022 fiscal year is \$23,401 (five percent of \$468,017), or \$30 per Association member, and that a larger special assessment would require the approval of a majority of a quorum of the Association’s members.

The City may soon consider governmental decisions regarding the proposed project. The site of the proposed project is located approximately 1,650 feet from Mayor Bryant’s residence, 2,345 feet from Councilmember Meyer’s residence, and 2,450 feet from Councilmember Rarey’s residence. You note that the water feature is a central feature of the Community’s aesthetics, and that governmental decisions relating to the water feature’s potential removal or replacement will likely generate considerable public participation.

ANALYSIS

Under Section 87100 of the Act, “[n]o public official at any level of state or local government shall make, participate in making or in any way attempt to use [their] official position to influence a governmental decision in which [the official] knows or has reason to know he has a financial interest.” “A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family,” or on certain specified economic interests. (Section 87103.) Among these specified economic interests is “[a]ny real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.” (Section 87103(b).)

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, “[a] financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official’s agency. A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6).”

Regulation 18702.2 sets forth the materiality standards applicable to a decision's reasonably foreseeable financial effect on an official's real property interest. Under subdivision (a)(3) of that regulation, a decision's financial effect on an official's real property interest is disqualifying if the decision “[w]ould impose, repeal, or modify any taxes, fees, or assessments that apply to the parcel.” However, notwithstanding Regulation 18702.2, a decision's financial effect on an official's

⁴ See Civil Code section 5605(b).

financial interest is not material “if it is nominal, inconsequential, or insignificant.” (Regulation 18702(b).)

In *Brower* Advice Letter, No. A-21-159, recognizing that the estimated the cost of repairing the water feature (between \$75,000 and \$100,000) would cost, at most, \$129 per member, we concluded that potential cost was nominal. Therefore, we advised, “decisions relating to the Project would not have a disqualifying financial effect on the Councilmembers' respective real property interests in their residences, and the Act does not prohibit those Councilmembers from taking part in those decisions.”

Our analysis in *Brower* did not address the potential financial impact of a decision to reconstruct the water feature—at a cost of up to \$770 per Association member—because, we explained, “there is currently no indication that this option will be pursued as the Association has no obligation at this time to reconstruct the water feature.” In contrast to a potential \$129 assessment, a \$770 assessment would not constitute a nominal amount. Accordingly, if the City Council is considering a decision that includes the potential reconstruction of the water feature and the funding needed for the reconstruction, the Councilmembers are prohibited from taking part in that decision unless a Councilmember’s participation is legally required or the decisions are properly segmented.

Legally Required Participation

Even if a public official would ordinarily be disqualified under the Act’s conflict of interest provisions, Section 87101 provides that an otherwise disqualified public official is not prohibited from taking part in a governmental decision to the extent his or her participation is *legally required* for the action or decision to be made. Section 87101 is narrowly interpreted to permit the participation of the fewest financially interested persons possible in any decision. (See *In re Hudson* (1978) 4 FPPC Ops. 13; *Gillig* Advice Letter, No. A-96-150; *Hill* Advice Letter, No. I-89-160.) Regulation 18705 states:

- (c) This regulation shall be construed narrowly, and shall:
 - (1) Not be construed to permit an official, who is otherwise disqualified under Section 87100, to vote to break a tie.
 - (2) Not be construed to allow a member of any public agency, who is otherwise disqualified under Section 87100, to vote if a quorum can be convened of other members of the agency who are not disqualified under Section 87100, whether or not such other members are actually present at the time of the disqualification.
 - (3) Require participation by the smallest number of officials with a conflict that are “legally required” in order for the decision to be made. A random means of selection may be used to select only the number of officials needed. When an official is selected, the official is selected for the duration of the proceedings in all related matters until the official’s participation is no longer legally required, or the need for invoking the exception no longer exist.

Regulation 18705 further specifies that the legal requirement for participation may be established only if there is no alternative source of decision, the legal basis for the determination is disclosed, the official discloses the conflict and describes with particularity the nature of the financial interest(s). Thus, a public official disqualified under Section 87100 may participate in the

making of a governmental decision only if a quorum cannot be convened with other members who are not disqualified under Section 87100.

Segmentation

Additionally, Regulation 18706(a) provides that an agency may segment a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:

- (1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated⁵ to the decision in which the official has a disqualifying financial interest;
- (2) The decision in which the official has a financial interest is segmented from the other decisions;
- (3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official's participation in any way; and
- (4) Once the decision in which the official has a financial interest has been made, the disqualified public official's participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.

Thus, if the above conditions are satisfied and the City Council first addresses whether it will reconstruct the water feature, the disqualified Councilmembers could permissibly take part in the remaining decisions concerning the water feature (e.g., whether to repair it or replace it with a planter).

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel

By:


Kevin Cornwall
Counsel, Legal Division

KMC:dkv

⁵ The term "inextricably interrelated" means the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.